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No. 08-453

IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,
Petitioner.

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Respondents.*

On Writ of Certiorari To The
United States Court of Appeals For the Second Circuit

BRIEF *AMICI CURIAE* OF CENTER FOR RESPONSIBLE LENDING, AARP, NATIONAL CONSUMER LAW CENTER, U.S. PUBLIC INTEREST RESEARCH GROUP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, SOUTH BROOKLYN LEGAL SERVICES, CONSUMERS UNION, PUBLIC CITIZEN, NEW YORK CITY'S DEPARTMENT OF CONSUMER AFFAIRS AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici on this brief are organizations and governmental bodies with a commitment to consumer protection who have an interest in seeing strong and effective enforcement of consumer protection laws. We have seen the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices, and believe that consumers, communities and the economy would be ill-served by concentrating in one federal agency the authority to enforce non-preempted state consumer protection laws as to some of the nation's largest banks and their operating subsidiaries.

SUMMARY OF ARGUMENT

Federal banking law leaves a significant role for state laws over the day-to-day operations of national banks. But for those non-preempted laws to have any effect, they must be enforced. Under ordinary principles of sovereignty, it would be up to state officials to ensure that their own non-preempted laws are enforced. Yet the Office of the Comptroller of the Currency ("OCC"), through its

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[1] The parties have consented to the filing of this brief. Letters of consent from Attorney General Cuomo and The Clearing House Association have been filed with the Clerk of the Court. A letter of consent from the United States Solicitor General accompanies this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to its preparation or submission.

promulgation of 12 C.F.R. § 7.4000, sought to forbid state officials from enforcing their own laws. Instead, it arrogated unto itself the right to be the sole entity to decide when, how, or even if non-preempted state laws will be enforced.

OCC exceeded its authority in promulgating this rule, and for that reason alone the decision below must be reversed. Attorney General Cuomo cogently explains why the regulation's disabling of state enforcement is inconsistent with this Court's previous interpretations of the National Bank Act, substantially disturbs the state-federal balance, and concerns a question of legal interpretation in which courts rather than administrative agencies are experts. Even if the National Bank Act could be interpreted in the way adopted by OCC, upholding the visitorial powers regulation requires evidence that OCC has the will, the experience, the expertise, and the capacity to replace that which it seeks to displace. That evidence is missing.

While state officials have a long and impressive record of protecting their citizens from abusive financial practices—a power the regulation broadly strips away—there is little evidence that OCC can or will enforce those state laws effectively and vigorously. In this brief, we compare the enforcement records of the states, *see infra* Section I, and OCC, *see infra* Section III. We also discuss the troubling implications for enforcement likely to result from the agency's expansive interpretation of "banking" activities and from the extension of the protective cloak of preemption to third-party agents. *See infra* Section II. We conclude that enforcement

of non-preempted state laws would not be left in good hands if OCC's expansive self-asserted authority is upheld.

ARGUMENT

I. THE VISITORIAL POWERS REGULATION IGNORES STATE OFFICALS' CRITICAL ROLE IN ENSURING FINANCIAL PRACTICES COMPLY WITH CONSUMER PROTECTION LAWS.

At its core, the dispute over this regulation is the challenge it presents to the fundamental understanding of our federal system. This Court has recognized, in interpreting the National Bank Act, that a state's power to sue to enforce its law is "inherent in the very conception of law." *First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640, 660 (1924). To separate the law from its enforcement is to cede the right to make it meaningless, or at least to make it mean less. For that reason, when the state law applies to a national bank, it is the right of the state to enforce it. *Cf. Jackson v. First Nat'l Bank of Valdosta,* 349 F.2d 71, 75 (5th Cir. 1965).[2]

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[2] The Bank of Valdosta had breached the limits of the applicable state standards on branching, apparently with the sanction of the Comptroller of the Currency. The court noted that the state was well-suited to enforce the law's limits on a bank which, "even with the approval of the Comptroller of the Currency, would naturally be inclined to push the restrictions of [the authorized activity] to, or, if possible, beyond their proper limits." 349 F.2d at 75 (footnote omitted).

In promulgating the visitation regulation, OCC far exceeded its authority to disturb this fundamental balance, which alone warrants reversal of law. But on a more ordinary level, this regulation violates even basic principles of administrative law.

An administrative agency in adopting regulations "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Yet, as the Second Circuit opinion acknowledged:

> [T]he OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*.

Pet. App. 25a-26a. Part of the record on which OCC should have based the decision was the objective facts about where the responsibility for and record of enforcement of consumer protection laws in this country has lain for decades.

State officials have a long track record of providing invaluable enforcement of consumer protection laws, including enforcement relating to financial practices. Even prior to the enactment of the visitation rule, the attorneys general of all fifty states submitted comments to OCC in 2003 that catalogued a wide range of unfair practices by financial institutions, ranging from unfair solicitations to racial targeting, that their offices had recently investigated. *See* Comment Letter from National Association of Attorneys General to OCC, Docket No. 03-16 (Oct. 6, 2003), *reprinted in Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004). The record of state action in fact demonstrates two decades of enforcement of state consumer protection laws *against national banks*, without question or challenge as to their authority until the agency's recent expansive interpretation of the regulation.[3]

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[3] State laws prohibiting unfair or deceptive acts or practices, a primary tool used by state attorneys general for consumer protection, were primarily adopted during the 1970s. Reported cases indicate enforcement of state consumer protection laws against a national bank as early as 1981. For example, the state of Alaska sued a national bank in connection with its role as a financer of a real estate development—an authorized banking activity. *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982). Similarly, Michigan sued a national bank over its mortgage escrow practices—though mortgage lending is also an expressly authorized banking activity. *Attorney Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405, 414 (Mich. Ct. App. 1981), *rev'd in part and remanded on other grounds*, 325 N.W.2d 777 (Mich. 1982); *see also Arizona v. Sgrillo*, 859

(Continued)

Often, the banks involved in these cases were providing the means to finance a fraudulent or deceptive sale. As the West Virginia Supreme Court has noted, banks are a necessary party to assure adequate remedies for the victims:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under [a state consumer protection law] did not include lawsuits against financial institutions such as the defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.

Scott Runyan Pontiac-Buick, 461 S.E.2d at 526.

In addition to losing the states' experience in enforcing such matters, depriving the states of the right to enforce their non-preempted consumer

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P.2d 771 (Ariz. Ct. App. 1993) (listing Valley National Bank as a defendant in case involving sale of information about credit cards); *Wisconsin v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994), *aff'd*, 532 N.W.2d 449 (Wis. 1995) (naming Household Bank, N.A. as a defendant in a case involving advertising and marketing); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995) (allowing a state attorney general's claims against Citizens National Bank for assignee liability as financer of dealer's car loans to go forward).

protection laws raises serious concerns of capacity. According to a recent congressional report, state banking agencies and state attorneys general offices employ nearly 700 full time staff to monitor compliance with consumer laws, more than seventeen times the number of OCC personnel allocated to investigate consumer complaints. H. Comm. on Financial Services, 108th Cong., Views and Estimates on Matters To Be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005, at 16 (Comm. Print 2004). "In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions." *Id.*

The current economic troubles make abundantly clear that, in the absence of experienced and capable consumer protection law enforcement, the mortgage industry will fail to abide by even the most common sense rules of its own business. Though, as it turns out, it was but a thumb in the dike, nevertheless, state officials were on the front lines of investigating and conducting enforcement against the deception and unfairness that permeated the origination of risky mortgage loans very early, and remained so, providing those state officials with considerable experience and expertise.[4]

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[4] In the midst of the subprime boom, OCC officials dismissed state efforts to enforce consumer protection laws related to lending as unnecessarily adding "cost burdens" on national banks by "requir[ing] a bank to increase compliance staff, provide additional training to both existing and new staff, and (Continued)

Further, state officials took strong action against the market leaders, not merely small players in the market. As early as 1998, several states joined forces against First Alliance Mortgage Company. *See* Diana B. Henriques, *Mortgaged Lives: Profiting from Fine Print with Wall Street's Help*, N.Y. Times, Mar. 15, 2000, at A1. In 2002, they obtained a record $484 million settlement against Household, one of the top two or three largest originators of subprime mortgages from 1998 to 2002. *See Household To Pay Record Fine and Change Lending Practices*, N.Y. Times, Oct. 12, 2002, at C4. This was followed by an investigation into the subsequent subprime market leader Ameriquest, which also resulted in a large settlement to compensate victimized consumers. *See Ameriquest To Pay $325 Million in a Settlement over Lending*, N.Y. Times, Jan. 21, 2006, at C13. Most recently, states obtained for consumers a multi-billion dollar settlement from Countrywide. *See* Gretchen Morgenson, *Countrywide To Set Aside $8.4 Billion in Loan Aid*, Oct. 5, 2008, at B1.

Not only have state officials successfully obtained settlements for consumers victimized by

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pay fees to obtain third-party sampling and certification [on loan quality]." *Congressional Review of OCC Preemption*, *supra*, at 207 (written statement of Julie L. Williams, Chief Counsel, OCC). But had national banks expended such modest amounts at that time to ensure that the loans they made or purchased had been evaluated for the ability of borrowers to repay, they would have been less likely today to face the massive losses that resulted from reckless real estate lending that pervaded the market. *See infra* Section III.D.

abusive mortgage practices, but they have also obtained judicial determinations that certain lending practices violated consumer protections law. The Massachusetts Attorney General has been particularly active on this front, suing lenders for having engaged in an illegal unfair or deceptive trade practice or act by making subprime loans that, through a combination of features commonly included by lenders during the boom years, ensured that borrowers would not be able to afford the loans over the long-term. The Attorney General's position recently received unanimous vindication by the Massachusetts Supreme Judicial Court. *See Commonwealth v. Fremont Inv. & Loan,* 897 N.E.2d 733 (Mass. 2008). The Massachusetts Attorney General's action promises that, as long as state officials continue to have a role policing financial practices, such unfair lending practices will not return to that state and cause a future generation of its residents to face a wave of foreclosure.

Crucially, the states' enforcement efforts include not only monetary relief, but injunctive relief that is public and transparent. Citizens know what their states expect of companies offering financial services, which helps avoid relapses.[5] Shareholders can see what rules will govern the operations of the business. Injunctive relief that is clear and transparent helps establish boundaries, which deters

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[5] It also makes state officials accountable for how they have chosen to enforce state consumer protection laws. This result reinforces Attorney General Cuomo's discussion of the political accountability consequences of OCC's regulation disabling state enforcement efforts. *See* Pet. Br. 43-46.

other businesses from violating the law. On the other hand, secrecy, not transparency, is more characteristic of OCC's enforcement. *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 131-32 (2007) (written statement of John C. Dugan, Comptroller of the Currency) (explaining OCC primarily ensures consumer protection through "behind the scenes" supervision).

Even those who have served as federal regulators recognize the important role played by state officials in enforcing consumer protection laws in the financial field. Former Federal Reserve Chairman Alan Greenspan recently commented that the response to criminal or illegal acts related to mortgage lending "should be with the states' attorney general and, frankly, it should be beefed up a considerable amount from where it is at this stage." Jane Wardell, *Greenspan Defends Subprime Market*, St. Louis Post-Dispatch, Oct. 3, 2007, at D1 (internal quotation marks omitted).

In sum, there is significant evidence that enforcement by state regulators has served an important role in protecting consumers against abusive financial practices. To the extent that the visitorial powers regulation was destined to prevent these regulators from acting, OCC's failure to consider that fact renders the regulation invalid.

II. THE RULE WILL HAVE UNINTENDED CONSEQUENCES OF IMPEDING ENFORCEMENT INVOLVING ACTIVITIES AND ACTORS OUTSIDE OCC'S EXPERTISE.

The failure of OCC to consider the record of state officials enforcing consumer protection laws concerning financial practices is all the more erroneous when the true scope of OCC's regulation is considered. The language of the visitorial powers regulation may seem innocuous enough, purporting to prevent state officials from "[e]nforcing compliance with any applicable federal or state law concerning those activities . . . authorized or permitted pursuant to federal banking law." 12 C.F.R. § 7.4000(a)(2)(iii), (iv). But the power that the agency has sought to concentrate in itself over the past few years through this simple language is a much greater departure than appears at first blush. There is a compounding effect resulting from OCC's expansive reading of different parts of that regulation. It has expanded the concept of what constitutes "visitation," and diminished the "courts of justice" exception provided by Congress in 12 U.S.C. § 484. *See* Pet. Br. 10-11 (detailing the effects of the 1999 and 2004 amendments to the regulation).[6] It has also created an ever-increasing

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[6] The same day OCC issued the visitorial powers regulation, *see* 69 Fed. Reg. 1904 (Jan. 13, 2004), it also narrowed the universe of non-preempted state laws with its new preemption rules, *see* 12 C.F.R. §§ 7.4007(b), (c) (deposits), 7.4008(d), (e) (non-real estate lending), 7.4009(c) (incidental powers), 34.4 (real estate lending).

list of "authorized or permitted" activities—many of which are incidental to banking only through the thinnest of threads. All too often, those threads can leave states unable to take action against financial practices that run afoul of consumer protection laws.

A. The Visitorial Powers Regulation Protects a Broad Range of Activities and Actors.

While the Comptroller has discretion to authorize activities beyond those specifically enumerated in the National Bank Act, the exercise of that discretion should "be kept within reasonable bounds." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). This Court's words of caution to OCC have not stopped it from stretching its discretion to the limits in expanding the scope of approved activities. *See* Michael S. Edwards, *OCC Interprets the National Bank Act to Permit Banks to Own Hotels and Windmills*, 59 Admin. L. Rev. 435 (2007) (discussing strained or misleading interpretations of precedent used by OCC in approving activities). OCC's list of authorized activities currently ranges from those that are quintessential banking services—such as making loans and offering credit cards—to activities far afield from the traditional business lines of a bank, or, indeed, the expertise of a financial regulator. These include unrelated products and services such as "welfare-to-work" counseling, selling automotive roadside assistance programs, or offering health insurance benefits counseling. *See* OCC, *Activities Permissible for a National Bank, 2007*, at 8, 16 (2008), *available at* http://www.occ.treas.gov/

corpapps/BankAct.pdf. Moreover, OCC has explained this list is subject to further expansion. *See id.* at 1 ("The business of banking is an evolving concept and the permissible activities of national banks similarly evolve over time.").

The swath of state investigative and enforcement power taken away by OCC's broad definition of activities authorized or permitted by federal banking law is further compounded by the lower courts' expansive interpretations of the parties who enjoy the National Bank Act's protections for nationally chartered banks. The lower courts have already expansively interpreted this Court's decision in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), to mean that independent contractors or third-party companies who have business relationships with federally chartered banks are the same as the bank itself (or its operating subsidiaries) for the purposes of preemption analysis. *See State Farm Bank, FSB v. Reardon*, 539 F.3d 336, 345 (6th Cir. 2008) (holding *Watters* preempts regulation of the independent contractors of a federally chartered thrift to the extent that the law would be preempted against the thrift itself under the Home Owners Loan Act); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532 (1st Cir. 2007) (relying on *Watters* in holding that a state law applicable to "third-party agents" who sold a national bank's financial products was preempted if the law was preempted against the national bank itself).

The logical next step, if the National Bank Act is interpreted to cast a shadow that long over agents of banks, is a claim—by the agent, the bank, or OCC

itself—that these agents also lie in the shadow of exclusive visitation authority. By virtue of simply arranging a customer's car loan with a national bank, is the car dealer thereby sheltered from state enforcement?[7] The implications are troubling indeed. As one commentator has observed, on one hand, the banks and regulators seek to maintain an identity between agents and the banks for regulatory purposes, while at the same time seeking to distance themselves from the acts of those agents. *See* Peterson, *supra*, at 546-47. OCC's attempt to protect these third parties, along with very practical considerations that impede any banking regulator's ability to provide adequate oversight of such agents, may have the unintended consequence of attracting agents "less adverse to predatory lending than the banks they represent." *Id.* at 542. The potential for a gap in oversight under this scheme is obvious, and raises precisely the prospect for muddled political accountability about which this Court has expressed concern. *See, e.g., Printz v. United States,* 521 U.S. 898, 930 (1997).

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[7] The OCC has issued an opinion letter which, while less than thoughtful in analysis, preempts state consumer protection laws as to a car dealer when, by arranging car loans with a national bank, it is acting as the agent of a bank. *See* Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 Am. U. L. Rev. 515, 530-31 (2007) (citing Preemption Determination, 66 Fed. Reg. 28593, 28595 (OCC, May 23, 2001)); *cf. Scott Runyan Pontiac-Buick* 461 S.E.2d at 526 (noting that consumer protection would be stripped of its efficacy if financial institutions could avoid enforcement for facilitating fly-by-night retailers).

The endgame appears to be that virtually no activity conducted by a national bank, or a party working with a national bank, may be investigated by a state official or subject to state enforcement action without constituting a prohibited exercise of "visitorial powers." This result appears to be true even if the national bank's illegal conduct concerns a law that is a matter of quintessential state concern. *Compare* 12 C.F.R. § 7.4000(a)(2)(iii), (iv) (defining "visitorial powers" as "[e]nforcing compliance with *any* applicable federal or state laws *concerning* those activities . . . authorized or permitted pursuant to federal banking law" (emphases added)), *with id.* § 34.4(b) (listing as not ordinarily preempted certain state laws essential to the legal infrastructure that supports the ability of national banks to conduct real estate lending, such as contract law, tort law, and criminal law).

Preventing state officials from ensuring national banks' compliance with necessary state laws whenever they touch an activity authorized or permitted by federal banking law is at odds with this Court's declaration just two years ago that "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Bank Act]." *Watters*, 127 S. Ct. at 1567. Nothing in *Watters*, or any of the cases it relies on for this proposition, suggest that federally chartered banks are exempt from the provisions in generally applicable state laws that give state officials power to investigate and enforce the dictates of those laws.

B. The Broad Ability To Circumvent State Officials Using the Visitorial Powers Regulation Is Already Becoming Clear and Preventing States from Addressing Pressing Public Policy Concerns.

It did not take long after the promulgation of the visitorial powers regulation for its effects on the states' ability to protect their citizens from abusive financial practices to be realized. A recent court battle between the West Virginia Attorney General and Capital One demonstrates just such a reality.

In that case, Capital One's credit card practices had been subject to a multi-year investigation by the Attorney General's consumer protection division. The investigation was based on consumer complaints about misrepresentations in advertisement for Capital One credit cards, unfair terms in those cards, and difficulties it created for customers who wanted to close their accounts. *Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613, 614-15 (S.D. W. Va. 2008). Three years into the investigation, Capital One changed its status from a Virginia-chartered state bank to a national bank chartered by OCC. *Id.* at 615. Less than two weeks after switching charters, Capital One filed suit in the United States District Court for the Southern District of West Virginia seeking a declaration that the investigation violated OCC's "visitorial powers" and required the Attorney General to cease its activities. *Id.* at 615-16. Judge Goodwin recognized that Capital One sought "to usurp West Virginia's power to investigate whether

national banks have violated West Virginia consumer protection law" and that the West Virginia's Attorney General's "lawful investigation was hijacked by Capital One's conversion to a national bank." *Id.* at 622. But regardless of the fact that the Attorney General's investigation focused solely on Capital One practices during a period of time when it was neither nationally chartered nor supervised by OCC, the court—heavily relying on the Second Circuit's opinion in *Cuomo*—ordered the Attorney General to stop the investigation against the bank. *Id.* at 621-22.

Judge Goodwin did, however, hold that the Attorney General had one other avenue available to continue its investigation—one that Capital One quickly tried to close off as well. In addition to investigating Capital One, West Virginia issued a subpoena to Capital One Services, Inc. ("COSI"), which was neither a division of the national bank nor an operating subsidiary. Judge Goodwin held that without such a relationship between COSI and Capital One, an investigation of COSI did not violate the "visitorial power" regulation. *Id.* at 623-28. However, six months later, Capital One gained approval from OCC to convert COSI into an operating subsidiary, and Capital One moved for relief from the order allowing the investigation against COSI to continue. *See Capital One Bank (USA), N.A. v. McGraw*, No. 08-cv-165 (S.D. W. Va. Jan. 26, 2009). Although Judge Goodwin refused to amend the judgment because Rule 60(b)(6) relief "is not for the purpose of relieving a party from free, calculated, and deliberate choices," the ability of

national banks to manipulate corporate forms to avoid state investigations is quite clear. *Id.*

Not only have national banks already begun using the visitorial powers regulation to avoid state law enforcement, but its use also threatens to hamper state officials in their efforts to address the growing foreclosure crisis—a matter of quintessential state concern given that debt collection and foreclosure are creatures of state law.[8] Key to understanding the current foreclosure crisis is investigating the dealings between struggling borrowers and the companies that "service" mortgage loans by collecting payments, maintaining accounts, and handling correspondence with borrowers.

One of the reasons that ensuring consumers' fair treatment by servicers is currently a major concern is the growing evidence that some servicers

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[8] Given that debt collection and foreclosure operate using state judicial and law enforcement infrastructure, citizens likely will hold their state policymakers accountable for problems related to those subjects. Federalism-related concerns therefore are raised by federal law limiting state policymakers' ability to investigate and correct problems related to collections and foreclosure. *See* Pet. Br. 43-45. Such an interpretation would also undermine state and local licensing schemes that govern the conduct of a range of third parties that engage in transactions with federally chartered banks—such as second hand car dealers and debt collection agencies. Such licensing schemes provide consumers with important protections, while creating a fair marketplace by leveling the playing field among businesses.

routinely violate consumer rights, which in these precarious times can exacerbate the foreclosure problem. Academic studies and court proceedings, especially in bankruptcy courts, have exposed an industry rife with sloppy accounting, at best, and at worse a mindset that simply views a homeowner's account as a source for revenue through the imposition of questionable fees that strapped homeowners are unable to afford. *See, e.g.*, Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008); *Federal Trade Comm'n v. EMC Mortgage Corp.*, No. 08-cv-338 (E.D. Tex. Sept. 9, 2008) (stipulated final judgment and order) (settling allegations of illegal mortgage servicing conduct by requiring $28 million compensation to customers).

National banks are not immune from this phenomenon. *See, e.g.*, *In re Stewart*, 391 B.R. 327, 340 (Bankr. E.D. La. 2008) (holding Wells Fargo, responsible for "systematic" errors in the way it serviced loans of borrowers in bankruptcy). In at least one case, a national bank member of the Clearing House has invoked the exclusive visitorial authority of OCC to argue that it is so broadly shielded from investigation that even a federal bankruptcy court cannot consider whether its servicing practices violated state law. *See In re Stewart*, No. 07-11113, 2008 WL 5096011, at *6 (Bankr. E.D. La. Oct. 15, 2008). Although the bankruptcy court held the "courts of justice" exception to the visitorial powers regulation led this argument to be "frivolous" when applied to the court's own authority, *id.*, a state official enforcing that servicer's compliance with state collections and

foreclosure law would receive no benefit from that exception under OCC's interpretation, *see* 12 C.F.R. § 7.4000(b)(2) (specifying the courts of justice exception does not apply to actions brought by state authorities).

Consequently, state policymakers already face the prospect of being unable to police abuses of their state debt collection and foreclosure laws by national banks. The broad sweep of the visitorial powers regulation, if upheld, portends that states may face a similar fate in trying to investigate the effectiveness of, and to enforce, their non-preempted laws in a much broader swath of public policy concerns.

III. OCC'S RECORD OF ENFORCEMENT OF CONSUMER PROTECTION LAWS IS INADEQUATE TO SUPPORT THE EXTENSION OF EXCLUSIVE VISITORIAL AUTHORITY TO NON-PREEMPTED STATE LAW.

OCC, in effect, has told the citizens of the all the states to trust that it will be as rigorous in protecting their rights under state law as their own officials have been. But the agency's history of enforcement of federal consumer protection laws, regulations, and its own guidance—much less non-preempted state consumer protection laws—fails to build the necessary record to support the extension of OCC's exclusive enforcement powers created by the visitorial powers regulation.

There are a variety of systemic reasons that explain OCC's shallow record of enforcement. The

discussion of Capital One's actions to evade West Virginia's effort, *see supra* Section II.B, is an example of one of those reasons—regulatory arbitrage.[9] Another explanation lies in the agency's focus and priorities. OCC's traditional focus and experience has been on safety and soundness, rather than consumer protection. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda,* 78 Temp. L. Rev. 1, 73 (2005); Bar-Gill & Warren, *supra*, at 90. Its record on consumer protection enforcement is one of little experience and little evidence of expertise.

In contrast, as already noted, the states have long experience in enforcement of non-preempted state consumer protection laws. Following *St. Louis*, state attorneys general brought non-discriminatory consumer protection enforcement actions against national banks, even when the conduct involved authorized bank powers. *See supra* Section I. This activity occurred over the course of more than two decades during which OCC was virtually silent, a fact that even the agency has acknowledged.

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[9] A system where regulated entities can shop for the most favorable legal regime and regulatory enforcement can lead to "regulatory arbitrage." *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 79-83 (2008). OCC, then, also has financial incentives to create an enforcement regime attractive to industry that attracts additional institutions. *See* Pet Br. 51.

A. OCC's Record on Consumer Protection Enforcement: Recent, Reluctant, and Inadequate.

OCC's consumer protection authority is grounded in two different categories of federal law, and the experience under neither gives grounds for confidence in vigorous enforcement of consumer protection. Though the agency purports to exercise much of its enforcement muscle behind the scenes, what is visible suggests instead that the agency may act vigorously only when pushed by external events. This appears to be especially the case if it means challenging the practices of the larger banks it supervises, and from whom most of its assessments come. Until 2008, it had taken no public consumer protection enforcement actions against a major bank. *See* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 232 (2004). From all appearances, as we describe in Section III.C, the action last year is the exception that proves the rule of OCC's reluctant efforts for consumer protection.

Federal consumer protection laws such as the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) explicitly charge OCC with enforcement authority. *See* 15 U.S.C. §§ 1607(a)(1)(A) (TILA), 1691c(a)(1)(A) (ECOA). From 1987 to the present, OCC brought only four formal enforcement actions under ECOA and its implementing regulation, and from 1999 to 2007, OCC made no referrals under ECOA to the U.S.

Department of Justice of matters involving race or national origin discrimination in mortgage lending. From 1997 to 2007, the Federal Reserve Board reported just nine formal enforcement actions against banks by OCC under TILA.[10]

Even more telling is OCC's history with the prototypical consumer protection laws. All of the agency's enforcement of state and federal laws against unfair or deceptive acts or practices is both of recent vintage and not robust. OCC admits that it was not until 2000 that it invoked long-dormant consumer protection authority provided by the 1975 amendments to the Federal Trade Commission Act. *See* Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (citing authority from the early 1970s indicating that OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, noting that OCC brought its first such case in 2000, and conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach

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[10] Information on OCC's enforcement actions is contained in annual reports that the Federal Reserve Board and the U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f; Board of Governors of the Federal Reserve System, Annual Report, *available at* http://www.federalreserve.gov/boarddocs/rptcongress/; U.S. Attorney General, Annual Report to Congress Pursuant to the Equal Credit Opportunity Act, *available at* http://www.usdoj.gov/crt/housing/housing_special.php.

consensus on their authority to enforce the FTC Act").

OCC's first foray into the field was to become involved in an on-going investigation begun by California state officials against Providian National Bank, culminating in a joint settlement in 2000.[11] Though the bank was long known in the industry as a "poster child" for abusive practices, *see* Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s European and North American card business), Letter to the Editor, *Comptroller Has Duty To Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17, the agency did not act until after California did. OCC's effort coincided roughly with the agency's 1999 expansion of the visitorial powers regulation to limit a state's right to enforce its own laws, *see* Pet. Br. 10. One industry lawyer explained that the two events were related, as the agency recognized that OCC "couldn't replace something with nothing" if it was going to try to displace state consumer protection enforcement. *See Congressional Review of OCC Preemption*, *supra*, at 97.

In the decade since OCC dusted off its FTC Act enforcement authority, its performance on consumer protection has been unconvincing, at best. During that time, OCC has taken only a dozen enforcement actions. *See* OCC, Consumer Protection

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[11] *See* Press Release, OCC, Providian To Cease Unfair Practices, Pay Consumers Minimum of $300 Million Under Settlement with OCC and San Francisco District Attorney (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000-49.txt.

News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm. Moreover, OCC has a history of ignoring consumer complaints regarding predatory lending practices by its banks, and indeed refusing to intervene on behalf of consumers, considering allegations of abusive practices "private party situation[s]." Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown—States Federal Agencies Clashed on Subprimes as Market Ballooned*, Wall St. J., Mar. 22, 2007, at A1 (quoting OCC's response to an elderly consumer with an abusive loan originated by a national bank).

It is also unclear whether OCC examiners even look for violations of non-preempted state consumer protection laws. In defending OCC's consumer protection record before Congress, the Comptroller chronicled various federal laws that its examiners ensure national banks meet but did not once speak of any effort to enforce state consumer protection laws. Most tellingly, he summarized OCC's consumer protection role as being "responsible for ensuring that national banks comply with applicable *federal* consumer protection laws." *Improving Federal Consumer Protection in Financial Services*, *supra*, at 128 (written testimony of John C. Dugan, Comptroller of the Currency) (emphasis added). Specifically relevant to this case, OCC's handbook detailing fair lending examination procedures for its bank examiners fails to include any mention of state antidiscrimination laws. *See* OCC, *Fair Lending Examination Procedures: Comptroller's Handbook* (2006), *available at* http://www.occ.treas.gov/handbook/fairlep.pdf.

While the agency has tried to deflect criticism of its record and that of the national banks it supervises by pointing to worse abuses by entities not under its regulation, it has failed to address problems that were—or are—clearly and unequivocally in its own house. The agency has also repeatedly defended its thin public record of enforcement by claiming, in essence, that it takes care of problems in the privacy of the home. Far from providing the kind of transparency that brings accountability, the agency's message instead is to tell consumers, in short: "Trust Us." *See* Stephanie Mencimer, *No Account*, The New Republic, Aug. 27, 2007, at 14.

But the publicly available record leaves us less than sanguine that it has earned such blind trust. The story of OCC's enforcement is that its actions are few, and, particularly when larger banks are involved, by all appearances too often occur only when its hand is forced. In the following section, we discuss a few of those problems, and OCC's inadequate response.

B. Preacquired Account Marketing: Banks in Partnership with Deceptive Direct Marketers.

The right to partner with third-parties to market products wholly unrelated to banking services is among the permitted incidental activities for national banks. Preacquired account marketing programs are a particular kind of frequently abused direct marketing of products that require the full

participation of banks. Banks provide third-parties with personal information about credit card or mortgage account holders and their accounts to use in targeted marketing for usually low-value, high-margin add-on products. The bank's name is typically used in the promotional materials and calls. But the most insidiously deceptive feature of the arrangement is that the relationship with the bank provides the marketer with a "back-door" means of charging the consumer's account based on its own interpretation of "consent" to a "free" opt-out thirty-day trial period. Often consumers were unaware they "consented" to the trial period, and were certainly unaware the marketer had the means to place a charge for the service on their credit card or mortgage account after thirty days, since the consumer did not give them account information.[12]

States pursued these unfair and deceptive practices vigorously against all the participants in these schemes, including major banks Chase, Citi, and First USA-Bank One. OCC, by contrast, not only failed to uncover such abuses in their supervision of these entities, but affirmatively intervened to try to prevent Minnesota's action against Fleet Mortgage Corporation, an operating subsidiary of a national bank, when its participation in one of these schemes resulted in unauthorized

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[12] For a more complete description of preacquired account marketing, see Comments of the Attorneys General, *In the Matter of Telemarketing Review–Comment*, FTC File No. R411011, at 29-34 (Apr. 15, 2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf.

charges to customers' mortgage accounts. *Minnesota v. Fleet Mortgage Co.*, 181 F. Supp. 2d 995 (D. Minn. 2001).[13]

Though the states' efforts to combat preacquired account marketing abuses by national banks clearly made OCC aware of this problem (as demonstrated by its own effort to stop Minnesota's suit), it was the states that subsequently acted against a repeat national bank offender. A complaint filed against Chase by the State of California in 2005 describes another preacquired account marketing scheme where the mechanism for paying for such non-banking products was to cash checks issued by Chase for what appears to be a "reward." Signing the check for a sum up to $10 actually enrolled customers in the "free" trial membership, again requiring them to take affirmative action to opt-out. *People v. Chase Bank USA, N.A.* No. GIC850483 (Cal. Super. Ct. July 12, 2005), *available at* http://ag.ca.gov/newsalerts/cms05/05-054_0a.pdf. Chase ultimately entered into a settlement with California and other state attorneys general to repay victims of the scheme $14.5 million, although it maintained in the settlement that the states' enforcement action constituted a prohibited exercise of visitorial powers. *See People v. Chase Bank USA, N.A.*, No. GIC850483 (Cal. Super. Ct. Dec. 2006), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/2006-12-11_Chase_Settlement_Judgment.pdf.

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[13] The court rejected OCC's claim of exclusive visitation.

There is no record that OCC has been similarly aggressive against such abuses. Its only public response to these marketing abuses has been its effort to stop Minnesota's action against Fleet. Indeed, as explained in section II.A, the shadow of third-party agents being entitled to assert the shield of preemption makes the agency's silence more worrisome.

C. "Remotely Created Checks": Banks Facilitating Telemarketing Fraud.

After three years without taking a single public consumer protection enforcement action, OCC took its first action against a major bank in 2008. *See* Press Release, OCC, OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors (Apr. 25, 2008), *available at* http://www.occ.gov/ftp/release/2008-48.htm. But the history behind that action suggests it does not signal OCC's launch of a newly aggressive and energetic focus on consumer protection. Instead, it reinforces the view of a reluctant agency forced to act by external events.

OCC's investigation appears to have resulted from actions pursued by others, and its initial resolution did not place a high priority on aiding consumers who were harmed by the bank's activities. Only after a legal challenge was mounted to a weak settlement did OCC finally reach a resolution that both adequately enforced consumer protection laws and was sufficient to deter other banks from facilitating telemarketing fraud.

Telemarketing fraud perpetrators have made full and imaginative use of "innovative" banking products to bilk millions of dollars from consumer bank accounts. *See Improving Federal Consumer Protection in Financial Services*, *supra*, at 215-16 (written statement of Thomas J. Miller, Attorney General, State of Iowa) (summarizing states' efforts to stop fraudulent telemarketing schemes). One of these scams involves fraudulently obtaining bank account information, which is then used to create a type of check that consumers do not write or sign, called "remotely created checks." Victims are harmed not only by the unauthorized withdrawals initiated by these unsigned checks, but they are then often subjected to fees for having overdrawn accounts. State attorneys general and the Federal Trade Commission have been very active in fighting the telemarketers themselves, and the payment processing companies who create these unsigned checks.

For the scam to work, it is necessary to find a bank willing to accept the payment processing companies as customers, process these unsigned checks, and then turn a blind eye to the evidence that those customers are participating in fraud. Evidence that Wachovia might be doing just that came to light during a Department of Justice prosecution against a payment processor in late 2006. *See United States v. Payment Processing Ctr., LLC*, 461 F. Supp.2d 319, 330 n.11 (E.D. Pa. 2006)

[hereafter *PPC*].[14] The bank continued to do business with the company despite a huge rate of charge-backs (a fraud red-flag), and warnings by its own risk management staff (advising the bank to sever the relationship despite the loss of a revenue-generating customer), by other banks, and even by the Social Security Administration. *See* Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. Times, May 20, 2007, at 1; Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008, at C1.

PPC was not the only Wachovia customer actively participating in telemarketing fraud; others were targets of investigations by the Federal Trade Commission. OCC examiners apparently did not discover this during their own investigation, but only pursued the expanded inquiry after being informed of these additional relationships by private attorneys for PPC victims and prosecutors. *See* Plaintiffs' Memorandum in Support of the Petition for Approval of the Agreed Attorneys' Fees and Costs, *Faloney v. Wachovia Bank*, No. 07-1455 (E.D. Pa.) and *Harrison v. Wachovia Bank*, No. 08-755 (E.D. Pa.) at 3-4, 12, 15.

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[14] The court's order in a dispute over PPC's frozen accounts was issued November 8, 2006, and OCC's investigation apparently began that same month. While OCC investigations are secret, making it impossible to know for certain what prompted this one, OCC specified that its April 2008 original settlement with Wachovia concluded an 18-month investigation.

OCC originally announced a settlement agreement that provided for "potential claims" of $125 million for victims harmed by the bank's actions. *See* Charles Duhigg, *Big Fine Set for Wachovia to End Case*, N.Y. Times, Apr. 26, 2008, at C1. The agreement provided for cumbersome and lengthy claims process, which would have likely reduced the restitution actually paid to less than $15 million.[15] The use of this process would have favored the bank, to which any unclaimed funds reverted, over the victims. OCC's use of this claims process is particularly inexplicable when many of the victims are the vulnerable elderly. *See* Duhigg, *Bilking the Elderly, supra*, at 1.

This settlement, consequently, was challenged as inadequate by private intervenors, in an action supported by three members of Congress as *amici*.[16] Only then did OCC amend the settlement to provide

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[15] See *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 44 (D. Me. 2005), in which the court references expert testimony that claim return rates are ten percent or less in most settlements. *See also* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747 (1998).

[16] *See* Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of the Intervenor *Faloney* Plaintiff's Motion for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa. May 29, 2008). The North Dakota Attorney General expressed similar concerns, *see* Memorandum of Law of Faloney Plaintiffs in Support of Motion for Injunctive Relief Pursuant to the All Writs Act, 28 U.S.C. §1651, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa. May 9, 2008) at 16.

for direct restitution payments to the victims. *See* Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly (Dec. 11, 2008), *available at* http://www.occ.gov/ftp/release/2008-143.htm.

Once again, OCC was responsive to its consumer protection responsibilities only when moved by outside forces and, until challenged in court, favored the interests of the bank that allegedly wittingly facilitated the fraud, over the interests of consumers.

D. Toxic Mortgages: National Banks' Practices Contribute to the Severe Economic Toll.

OCC's efforts to deflect attention from its poor record by pointing to the non-depository originators as the culprits in today's mortgage crisis is ignores the much larger and more complicated story of regulatory failures, including its own. Taking a step back to look at this larger frame, evidence of weak enforcement even of OCC's own guidelines takes on enhanced significance. It militates against sanctioning OCC's claimed right to exclusively enforce the states' laws as well.

Today's mortgage crisis has its roots in the fact that the subprime and "Alt-A" (other non-prime loans) markets were dominated by two characteristics: 1) a virtual collapse in underwriting, meaning loans were made without regard to the ability to pay, relying instead on the assumption that they could be repaid through continued

refinancing or sale if necessary; and 2) a marked prevalence of loan products and terms that exacerbated the risk of failure.[17]

These risk-enhancing features included adjustable rates, highly complex negatively amortizing features, and little or no information on or documentation of income and assets. Multiple risk-enhancing features were often layered in individual loans, making them more fragile.

That these characteristics came to be so prevalent resulted from both origination practices, and the practices on the secondary market, which paid more for the riskier products. *See, e.g.*, Moody's Investors Service, Structured Finance in Focus, The Subprime Decline—Putting It in Context 3 (Mar. 25, 2008) ("The subprime crisis is largely a product of increasingly aggressive mortgage loan underwriting standards adopted as competition to maintain origination volume intensified amid a cooling

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[17] *See, e.g.*, Lei Ding et al., Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models (December 2008) (working paper at 16-17), *available at* http://www.ccc.unc.edu/abstracts/091308_Risky.php (finding risk may relate more to loan products and terms common to subprime market than borrower risk); Ellen Schloemer et al., *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* 21 (2006) (noting that among 2003 vintage originations there was a nearly 64% increase in foreclosure risk for loans requiring limited documentation of income and assets compared to fully-documented loans and a 117% increase in foreclosure risk among adjustable rate mortgage compared to fixed-rate loans), *available at* http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf.

national housing market."); Jon Meacham & Daniel Gross, *The Oracle Reveals All*, Newsweek, Sept. 24, 2007, at 32 (quoting Alan Greenspan explaining that investors' demand, not borrowers', drove the market).[18] When the actions of financial institutions on both the front-end and the back-end are taken into account, virtually no major financial institution or regulator can credibly evade responsibility.

Though OCC issued multiple guidances about underwriting and sound practices,[19] the record of

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[18] Countrywide's compensation structure for both brokers and its own in-house loan officers rewarded them most for the riskiest loans, and least for the most stable products: broker commissions were as much as 2.5% for the adjustable rate, negatively amortizing "payment option ARMs," 1.88% for subprime loans, but just 1.48% for standard, fixed rate loans. *See* Ruth Simon & James R. Hagerty, *Countrywide's New Scare–Option ARM Delinquencies Bleed Into Profitable Prime Mortgages,* Wall St. J., Oct. 24, 2007, at C1; *see also* Gretchen Morgenson & Geraldine Fabrikant, *Countrywide's Chief Salesman and Defender,* N.Y. Times, Nov. 11, 2007, § 3 at 1 (former employee discussing compensation system). Countrywide made mortgage loans through multiple entities, including a bank under OCC supervision until March 2007.

[19] *E.g.* OCC, *Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices,* Adv. Ltr. 2003-2 (Feb. 21, 2003); OCC, *Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans*, Adv. Ltr. 2003-3 (Feb. 21, 2003); OCC, *Guidelines Establishing Standards for Residential Mortgage Lending Practices*, 70 Fed. Reg. 6329 (Feb. 7, 2005). It also issued guidances jointly with other federal financial regulators. *E.g. Interagency Guidance on Nontraditional Mortgage Product Risks,* 71 Fed. Reg. 58,609 (Oct. 4, 2006); *Statement on Subprime Mortgage Lending,* 72 Fed. Reg. 37,569 (July 10, 2007); *Illustrations of Consumer*

(Continued)

some of the banks it supervise suggests poor follow-through on its exhortations. At the request of National City Mortgage, OCC stopped a Washington State inquiry into its mortgage practices in 2002. *See* Eric Nalder, *Mortgage System Crumbled While Regulators Jousted,* Seattle Post-Intelligencer, Oct. 11, 2008, at A1. The following year the parent, National City Bank and its subprime operating subsidiary First Franklin, sought an OCC ruling exempting national banks from state anti-predatory mortgage lending laws. *See* 68 Fed. Reg. 46,264 (Aug. 5, 2003). Those two entities went on to concentrate on such poorly underwritten loans that neither institution survived the current economic downturn intact. First Franklin even made OCC's own list of the "Worst Ten in the Worst Ten"—the originators with the largest number of foreclosures in the metropolitan areas with the highest foreclosure rates. *See* Letter from John Dugan, Comptroller of the Currency, to Elizabeth Warren, Chair, Congressional Oversight Panel (Feb. 12, 2009) (listing First Franklin and two other significant subprime lenders under OCC's supervision on the list); *see also* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev (forthcoming 2009).

Looking at the record from five of the nation's largest banks, all under OCC supervision, does not

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Information for Nontraditional Mortgage Products, 72 Fed. Reg. 31,825 (June 8, 2007).

build confidence in OCC's ability to take on the additional load of enforcing non-preempted state consumer protection and civil rights laws. These banks

> made heavy inroads into low- and no-documentation loans. The top-ranked Bank of America, N.A. had a thriving stated-income and no-documentation loan program which it only halted in August 2007, when the market for private-label mortgage-backed securities dried up. Bank of America securitized most of those loans, which may be why the OCC tolerated such lax underwriting practices. Similarly, in 2006, the OCC overrode public protests about a "substantial volume" of no-documentation loans by JPMorgan Chase Bank, N.A., the second largest bank in 2005, on grounds that the bank had adequate "checks and balances" in place to manage those loans.

McCoy, *supra* (manuscript at 35). Wachovia Bank, a major issuer of these loans, suffered a huge jump in losses on them. *Id.* at 36. Wells Fargo Bank admitted in a 2007 prospectus for a securitized pool of loans requiring little documentation from borrowers that it "had relaxed its underwriting standards in mid-2005 and did not verify whether the mortgage brokers who had originated the weakest loans in that loan pool complied with its underwriting standards before closing"; by mid-2008,

over one in five loans in the pool were in trouble. *Id* at 36-37.

Without a transparent record, we do not know how well OCC enforces even its own rules and guidances as to mortgage practices, much less any non-preempted state laws that might be relevant. But even the Treasury Department's Office of the Inspector General has raised questions about whether the OCC's general reluctance to exercise its enforcement authority may in fact encourage banks to put off addressing their problems. *See* Office of the Inspector General, *Audit Report, Safety and Soundness: Material Loss Review of ANB Financial, N.A.* 13, 19 (2008), *available at* http://www.treas.gov/inspector-general/audit-reports/2009/oig09013.pdf.

In contrast to OCC's record, the states indeed became quite active in enforcing consumer protections law against lenders—including, in particularly stark contrast to OCC's enforcement record, large institutions—from an early point in the subprime bubble, and have remained so. *See supra* Section I. Especially given the tools available to them in a largely deregulated environment, states have been very aggressive.

It was erroneous of OCC to not consider those comparative records of enforcement when promulgating the visitorial powers regulation. Accordingly, that regulation cannot lead the Court to alter the right of states to enforce non-preempted state laws as established in *St. Louis*.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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